Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

RAMIRO L. COLÓN-MUÑOZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the merits of the significant constitutional issues implicated by the *de facto* permanent judicial appointment of an interim United States Attorney be properly avoided, on the basis that Petitioner's challenge to 28 U.S.C. § 546(d), made at the conclusion of trial and not before trial, had no jurisdictional implications, particularly where the government had itself procedurally defaulted on the timeliness issue, by not raising it before its post-argument brief on appeal?

2. Is an interim U.S. Attorney a "principal officer" under the Appointments Clause, United States Constitution, Art. II, § 2, cl.2, making 28 U.S.C. § 546(d) unconstitutional on its face, because a vacancy in a "principal" office can never be filled by federal judges but only by the President with the advice and consent of the Senate, particularly when, as here, no exigent circumstances or intrabranch conflict of interests exist?

3. Does 28 U.S.C. § 546(d), which delegates to federal judges the power to appoint interim United States Attorneys, violate the Appointments Clause, United States Constitution, Art. II, § 2, cl.2, and principles underlying the separation of doctrine, particularly because a mere vacancy is not an exigent circumstance that could justify the judicial appointment of a federal prosecutor?

LIST OF ALL PARTIES

The caption of the instant case in this Court contains the names of all the parties to this proceeding, namely, Ramiro L. Colón-Muñoz and the United States of America.

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I. The petition should be granted because the court of appeals' conclusion that the issues raised by petitioner's challenge to the constitutionality of 28 U.S.C. § 546(d) were not jurisdictional and thus waived directly conflicts with this Court's opinions regarding the jurisdictional nature of such issues and their non-waivability. 10

II. The petition should be granted because 28 U.S.C. § 546(d) constitutes an unconstitutional and unjustified legislative delegation of executive powers and duties to the judiciary. 16

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Appendix C — Opinion Of The United States District Court For The District Of Puerto Rico Dated July 31, 1997 ..... 43a

Ramiro L. Colón-Muñoz respectfully petitions this Court for a writ of certiorari to review the judgment and Opinion of the United States Court of Appeals for the First Circuit entered on October 1, 1999.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported as *United States v. Colón-Muñoz*, 192 F.3d 210 (1st Cir. 1999) (App. A). The unpublished Orders of the District Court denying Petitioner's Motion for Judgment of Acquittal (App. B) and related discovery (App. C) were entered on July 30 and July 31, 1997.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on October 1, 1999. On December 20, 1999, under No. 99A 527, Justice Souter granted an extension of time to file this petition until February 28, 2000. The petition is being filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article II, Section 2, Clause 2 of the Constitution of the United States provides:

> . . . [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Article II, Section 2, Clause 3 of the Constitution of the United States provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

28 U.S.C. § 541 provides:

> (a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.
>
> (b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.
>
> (c) Each United States Attorney is subject to removal by the President.

28 U.S.C. § 546 provides:

> (a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.
>
> (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.
>
> (c) A person appointed as United States attorney under this section may serve until the earlier of—
>
> > (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
> >
> > (2) the expiration of 120 days after appointment by the Attorney General under this section.

(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

Fed. R. Crim. P. 12(b) provides:

(b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or
>
> (3) Motions to suppress evidence; or
>
> (4) Requests for discovery under Rule 16; or
>
> (5) Requests for a severance of charges or defendants under Rule 14.

Fed. R. Crim. P. 12(f) provides:

Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, * * * shall constitute waiver thereof, but the court *for cause shown* may grant relief from the waiver.

Fed. R. Crim. P. 6(d) provides:

(d) **Who May Be Present.** Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Fed. R. Crim. P. 6(e)(2) provides:

(2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt or court.

* * *

Fed R. Crim. P. 6(e)(3)(B)(ii) provides:

Exceptions

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

Fed. Crim. P. 29(c) provides as follows:

(c) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If

> a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

This Petition raises serious questions as to whether Article III Judges can, in the absence of any exigent circumstance or an intrabranch conflict of interest, appoint an interim U.S. attorney merely because a vacancy has arisen and the President has not yet acted. This appeal also implicates critical issues regarding the Appointments Clause and the separation of powers doctrine since the appointment of Guillermo Gil in 1993 was temporary and was never intended to last six years, only as long as it reasonably took President Clinton to appoint a U.S. Attorney for Puerto Rico. This controversy puts in question not only the validity of the indictment that underlies Petitioner's appeal but also the validity of the indictments pending against 900-plus defendants awaiting trial in Puerto Rico, including defendants facing the death penalty.

a. Procedural History.

On April 5, 1995, a federal grand jury in the District of Puerto Rico indicted Petitioner, Ramiro L. Colón-Muñoz, former President and Chief Executive Officer of Ponce Federal Savings and Loan, of charges relating to conspiracy, fraud, false entry, false statement, misapplication and criminal forfeiture. The indictment was personally sought and obtained by interim U.S. Attorney Guillermo Gil in at least three appearances before the grand jury. By the time the indictment against Petitioner was filed, Mr. Gil had served approximately 20 months as interim U.S. Attorney. Assistant U.S. Attorney Jorge Vega-Pacheco, who was appointed Chief of the Criminal Division by interim U.S. Attorney Gil, assisted Mr. Gil before the grand jury and at trial in prosecuting Petitioner Colón-Muñoz.

During the course of the presentation of the government's case-in-chief the government was obligated to turn over Section 3500 *Jencks* material. Fed. R. Crim. P. 26.2. The grand jury transcripts reflected that interim U.S. Attorney Gil had interrogated virtually all of the key witnesses that were summoned to the grand jury, including Petitioner Colón-Muñoz's co-defendant, José L. Blasini-Lluberas. The grand jury transcripts also made evident that the role played by Assistant U.S. Attorney Vega-Pacheco before the grand jury was secondary to Mr. Gil's.

Petitioner was convicted of all eleven counts. After the verdict was rendered, Petitioner submitted a timely Motion for Judgment of Acquittal made pursuant to Fed. R. Crim. P. 29(c). Among the issues raised in that motion was the constitutionality of Mr. Gil's judicial appointment and continuing service.

On June 2, 1997, Petitioner Colón-Muñoz , on the basis of newly discovered information, moved to obtain discovery of specific documents relevant to Mr. Gil's appointment and Petitioner's constitutional arguments. The documents were relevant to determining whether 28 U.S.C. § 546(d) had been unconstitutionally applied in Puerto Rico. The requested discovery included letter(s) sent by federal judges in the District of Puerto Rico to Attorney General Janet Reno, as well as letter(s) sent by Attorney General Janet Reno to the federal judges relating to Mr. Gil's interim appointment. On July 30, 1997, the District Court denied Petitioner's Motion for Judgment of Acquittal without opinion, (App. B) and on July 31, 1997, Petitioner's Supplemental Motion for Specific Discovery was denied without opinion. (App. C.).

On April 23, 1998, Petitioner was sentenced to 21 months in prison and fined $20,000. A two-year term of supervised release was imposed. Defendant was ordered to forfeit his interest in a 500-acre property the financing and purchase of which was the subject of the underlying criminal charges. Defendant appealed his conviction to the U.S. Court of Appeals

for the First Circuit. He has remained free on bail pending appeal.

After briefs were filed by both parties and after oral argument had been heard, the Court of Appeals in an Order dated April 9, 1999, specifically directed Attorney General Reno to supplement the government's brief, which had been filed out of the local Puerto Rico office, by addressing specific issues articulated in its April 9, 1999 Order. All the issues delineated by the Court of Appeals related to the legality and constitutionality of interim U.S. Attorney Guillermo Gil's appointment.

On October 1, 1999, the Court of Appeals vacated the judgment of conviction as to six of the eleven counts for which Petitioner was convicted for insufficiency of evidence. The court affirmed the convictions as to the remaining five counts. The criminal forfeiture of the 500-acre property was vacated on *ex post facto* grounds. (App. A).

The Court of Appeals failed to reach the merits of Petitioner's constitutional claims relating to Mr. Gil's appointment, on the basis that the motion should have been brought pretrial. However, the court cautioned "that this conclusion implies no judgment about the importance of the issues raised by Colón. . . ." *United States v. Colón-Muñoz*, 192 F.3d at 219. The court went on to say that it considered the issues relating to Mr. Gil's appointment to be "serious." *Id.* at 219.

b. Statement of Facts.

In November 1992, William Jefferson Clinton was elected to his first term as President of the United States. As a result of the 1992 presidential election Daniel López-Romo in 1993 resigned his post as U.S. Attorney for the District of Puerto Rico. In the wake of Mr. López-Romo's resignation, the Attorney General of the United States, Janet Reno, appointed Assistant U.S. Attorney Charles Fitzwilliams, a seasoned veteran prosecutor and a long-standing member of the U.S. Attorney's Office in Puerto Rico, to assume the post of interim U.S.

Attorney. Attorney General Reno acted under 28 U.S.C. § 546(a).

Prior to the expiration of the 120-day term allowed by § 546(a), Attorney General Reno, on information and belief[1] communicated to the district court her desire that Assistant U.S. Attorney Charles Fitzwilliams continue as interim. However, prior to the 120 days expiring, on information and belief, the District Court for the District of Puerto Rico, specifically, six federal judges, in accordance with 28 U.S.C. § 546(d) advised Attorney General Reno that they intended to appoint a different person as interim U.S. Attorney, to wit, U.S. Department of Justice Trial Attorney Guillermo Gil. The contents of the letter communicating the court's reasons for rejecting General Reno's decision and the court's reasons for appointing their candidate, Mr. Gil, are unknown and unknowable to Petitioner and the citizens of Puerto Rico. These communications have been conducted in secret and are contained in no public record. Moreover, access to them has been denied. (App. B). On September 9, 1993, Guillermo Gil was appointed by court order as interim U.S. Attorney for Puerto Rico.

President Clinton failed to exercise his powers and duties under the Appointments Clause to appoint a U.S. Attorney for the District of Puerto Rico during the entire first term of his Presidency. When President Clinton was reelected in November of 1996, interim U.S. Attorney Guillermo Gil was still the Interim U.S. Attorney in Puerto Rico. Indeed, Mr. Gil remains the interim U.S. Attorney to this day. As a result of the President's inaction, Mr. Gil's six-year tenure has lasted longer than the four-year term which presidentially appointed U.S. Attorneys enjoy. During the past six years interim U.S. Attorney Gil has exercised all the powers that a presidentially-appointed and Senate-confirmed U.S. Attorney enjoys, including the initiation of death penalty certifications a minimum of five cases.

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1. Since discovery was never granted, this allegation and others must be made on information and belief.

On information and belief Mr. Gil's former position with the United States Department of Justice is no longer vacant and has been filled by another prosecutor. Hence, any prosecutorial powers that arose from his former appointment as a Trial Attorney with the United States Department of Justice have expired. Furthermore, those residual prosecutorial powers if any survived his judicial appointment, were already non-existent, on information and belief, on April 5, 1995, the date Mr. Gil obtained an indictment against Petitioner Colón-Muñoz.

The indictment in this case bears only the signature of Assistant U.S. Attorney Jorge Vega-Pacheco and that of the foreperson of the grand jury. Neither the indictment nor pretrial proceedings suggested in any way that Mr. Gil had presented Petitioner's case to the grand jury or otherwise participated to any unusual degree.

At Petitioner's trial, Section 3500 *Jencks* material reflected that interim U.S. Attorney Gil had entered the grand jury room on at least three occasions during the investigation and presentation of this case, January 25, 1995, March 8, 1995, and March 22, 1995. On those dates, he actively questioned the government's principal witnesses and presented documentary evidence to the grand jury. A review of the same transcripts as well as of the trial transcripts makes clear that Assistant U.S. Attorney Vega-Pacheco was working directly under Mr. Gil's supervision at all times and participated in the grand jury and at the trial as an assistant to Mr. Gil.

c. Statement of Lower Court Jurisdiction under Rule 14.1(g)(ii)

The United States District Court for the District of Puerto Rico had subject matter jurisdiction of this criminal matter under 18 U.S.C. § 3231, save for the issue raised in this Petition. The indictment underlying this appeal alleged federal offenses committed in the District of Puerto Rico. The Court of Appeals for the First Circuit had jurisdiction of the appeal taken by Petitioner pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted because the Court of Appeals' conclusion that the issues raised by Petitioner's challenge to the constitutionality of 28 U.S.C. § 546(d) were not jurisdictional and thus waived directly conflicts with this Court's opinions regarding the jurisdictional nature of such issues and their non-waivability.

The court below declined to address the merits of the significant constitutional questions presented in this case on the basis that petitioner should have raised the issue in a pretrial motion, rather than post-trial. App. A, 192 F.3d at 216-17. That ruling conflicts with at least two lines of authority in this Court and with the decision of another Circuit. To correct the deviation from controlling precedent, and to allow the Court to address the highly important issues raised on the merits, the Court should grant certiorari.

As discussed in the statement of the case, trial counsel for Petitioner did not know that interim U.S. Attorney Gil's personal involvement with this case was more than routine until mid-trial, when *Jencks* material was disclosed. The defense refrained from raising these issues in this case until it became unequivocally clear that Mr. Gil's participation was not a mere formality or one of mere supervisory oversight. *See United States v. Kourí-Pérez*, 47 F. Supp. 2d 164 (D.P.R. 1999) (constitutional issues surrounding Mr. Gil's appointment not ripe on pretrial motion in routine criminal case where properly-appointed Assistant U.S. Attorney in fact conducted the grand jury proceedings and signed the indictment). When a motion to dismiss is based on facts about grand jury proceedings which are not revealed until after the motion deadline is passed, the motion cannot rationally be viewed as untimely when raised later. Indeed, in this respect the decision below conflicts with that of the Fifth Circuit in *United States v. Cathey*, 591 F.2d 268 (5th Cir. 1979).

Nor could the defense have obtained before trial the key information about Mr. Gil's grand jury appearances. Under Rule

6(e)(3)(C)(ii), the defendant must first make a factual "showing" before he can obtain discovery and disclosure of "matters occurring before the grand jury." (In this case, Mr. Gil did not even sign the indictment he had personally obtained, so there was literally hardly a clue available.) The Court should grant certiorari and hold that when, as here, matters occurring as trial reveal for the first time that the proceedings were fundamentally defective from their inception, a post-trial motion to dismiss or in arrest of judgment is totally appropriate and not untimely. Fed. R. Crim. P. 12(b)(2), 34.[2]

This Court has recognized that failure to raise by pretrial motion a defense that Fed. R. Crim. P. 12(b) requires to be presented before trial ordinarily results under Rule 12(f) in a procedural default, which can be overcome only on a showing of "cause and prejudice." *Davis v. United States*, 411 U.S. 233, 242 (1973). Procedural default, however, is in the nature of an affirmative defense, which is waived by the government if not raised in its answer to the allegedly untimely motion. *See Trest v. Cain*, 522 U.S. 87, __, 118 S.Ct. 478, 480, 139 L.Ed.2d 444, 448 (1997) (error for court of appeals to raise procedural default issue *sua sponte*), quoting *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996). The government chose not to answer Petitioner Colón's post-trial motion which raised the separation of powers

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2. The motion in this case invoked only Rule 29(c) as its basis (along with Rule 45(a), which merely indicated that the motion was timely filed within "seven days" after the verdict). However, the separation of powers issues were not based on insufficiency of evidence at trial, but on a fundamental defect in the prosecution itself. The post-trial motion, although labeled as arising under Rule 29(c), thus could more properly be viewed as one for arrest of judgment, because it raised a fundamental defect that could be resolved on the record (including the record of Mr. Gil's appointment) without reference to the evidence adduced at trial. *See United States v. Sisson*, 399 U.S. 267, 280-83 (1970) (distinguishing arrest of judgment from judgment of acquittal on this basis). Hence, the motion might be better viewed as resting upon Rule 12(b)(2) (jurisdictional defects) or Rule 34 (arrest of judgment).

argument.[3] That motion, with an attached affirmation, itself explained why no pretrial motion had been filed, making at least an offer to show "cause" for any default.

In addition, the waiver contention, as first presented by the government in its post-argument brief, amounted to an "alternative groun[d] for affirmance which the government did not raise below," *Ryder v. United States*, 515 U.S. 177, 185 n.4 (1995), which the court below therefore need not have reached. *Id.* For all these reasons, the court below disregarded this Court's precedent and abused its discretion under *Trest v. Cain* by allowing the government to prevail on its tardy procedural defense. The appointment issue is of obvious importance, is most certainly going to recur, and had been thoroughly briefed. The issue should have been decided on its merits.

Rule 6(d) of the Federal Rules of Criminal Procedure strictly authorizes only specific persons to appear before the grand jury. *See United States v. Mechanik*, 475 U.S. 66 (1986). Petitioner contended below that Mr. Gil's status as a judicially-appointed interim U.S. Attorney deprived him of the authority to appear in the grand jury as "an attorney for the government." Thus, Petitioner argued that the indictment underlying Petitioner's appeal was a nullity, the direct result of a constitutional violation.

The grand jury is unequivocally an "arm of the executive branch" which implements the constitutionally-defined power to initiate criminal prosecutions. *United States v. Martino*, 825 F.2d 754, 761 (3d Cir. 1987), quoting *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3rd Cir. 1973). For that reason, courts have repeatedly refrained from interfering in grand jury matters precisely because such actions implicate principles underlying the separation of powers doctrine. *E.g.*, *United States v. Eisenberg*, 711 F.2d 959, 965 (11th Cir. 1983); *In re Grand*

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3. Instead of answering the post-trial motion and raising any objections it might have, the government filed a motion to strike Petitioner's separate, later-filed supporting brief on timeliness grounds — relief which the lower court denied.

Jury Proceedings, 613 F.2d 501 (5th Cir. 1980); Indeed, when lower courts have transcended their supervisory powers to interfere with grand jury proceedings, the appellate courts have relied on separation of powers principles to define the limits of the judicial power. *See In re Grand Jury Subpoena of Rochon*, 873 F.2d 170, 174 (7th Cir. 1989) (order prohibiting Attorney General from participating in grand jury held to raise separation of powers concern.)

In *United States v. Mechanik*, 475 U.S. 66 (1986), the defendant sought dismissal of an indictment after trial on the ground that the presence of a second FBI agent in the same grand jury, who had testified *in tandem* with another agent, and, who was simultaneously present, constituted an unauthorized presence in the grand jury. This Court held that the later verdict of the trial jury rendered the technical failure to comply with Fed. R. Crim. P. 6(d) harmless, precluding appellate reversal of the district court's refusal to dismiss the indictment. The Court's reasoning was predicated on the pragmatic conclusion that the societal costs of retrying the case in which a non-constitutional error is alleged would be too burdensome to avoid the application of the harmless error rule. *Mechanik* counsels that courts should refrain from disturbing an indictment when the quality of the error alleged is non-constitutional and when it eventually proves harmless.

In a subsequent case, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court held that as to non-constitutional errors, a conviction "should not be overturned unless, after examining the record as a whole, a court concludes that an error may have had 'substantial influence' on the outcome of the proceeding." *Id.* at 256 (quoting *Kotteakas v. United States*, 328 U.S 750, 765 (1946)). The *Mechanik*, *Nova Scotia* standard, however, does not apply to Petitioner's case.

In *Bank of Nova Scotia* the Court identified a special class of cases in which indictments are dismissed without any particular assessment of prejudicial impact because the errors are considered "fundamental" and "ones in which the structural

protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." (Citing *Rose v. Clark*, 478 U.S. 570, 577-578 (1986), and *Vázquez v. Hillary*, 474 U.S. 254, 260-264 (1986) (racial discrimination in selecting of grand jurors compelled the dismissal of the indictment), and *Ballard v. United States*, 329 U.S. 187 (1946) (exclusion of women from the grand jury warranted dismissal of the indictment). With respect to these type of fundamental errors of constitutional magnitude, the Court held that the "violation[s] allowed a presumption that the defendant was prejudiced." *Id. Bank of Nova Scotia* makes clear that the verdict at Petitioner's trial (some of which survived appellate review) poses no bar to the dismissal of the indictment. Petitioner's complaint is constitutional in nature and falls squarely into the class of cases in which prejudice is presumed. *See Midland Asphalt Corporation v. United States*, 489 U.S. 794 (1989).

Petitioner contended before the Court of Appeals that the separation of powers issue precipitated by the unauthorized presence of Mr. Gil in the grand jury constitutes precisely the type of situation which this Court suggested would not be governed by the harmless error rule. In this case, however, the Court of Appeals failed to apply a constitutional standard. Hence, the Court held Petitioner's claims to have been waived because of Petitioner's failure to raise them before trial.

This Court has recognized two types of errors in criminal cases. "Trial error" which is subject to the "harmless error" rule and structural error which require reversal without further review. *See generally Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991). Structural defects are said to affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 307-08.

This Court has held that the Appointments Clause exists to sustain the balance of power between the branches of government. Accordingly, this Court has viewed defects in the appointment of judges and prosecutors as structural and

"jurisdictional" in nature. *See Glidden v. Zdanok*, 370 U.S. 530 (1962) (judgments made by Article III Judges who are found to have been improperly appointed might be deemed "vitiated" and movant need not prove prejudice); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879 (1991) (defect in appointment of special trial judge of the Tax Court described as going to "the validity of the Tax Court proceeding"; *Ryder v. United States*, 515 U.S. 182 (1995) (drug convictions of Coast Guard officials reversed because appointment of civilian judges to Court of Military Review violated Appointments Clause).

The decision of the court below deviated from this Court's precedent as to the timeliness of raising an Appointments Clause issue in particular. When "a constitutional challenge that is neither frivolous nor disingenuous" has been raised under the Appointments Clause, this Court has permitted the challenge to be heard even when it was raised for the first time on appeal. *Freytag v. Commissioner*, 501 U.S. 868, 879 (1991). Similarly, in *Ryder v. United States*, a military criminal appeal, the Court described as "timely," 515 U.S. at 182, an objection under the Appointments Clause to the seating of appellate judges which was raised for the first time in a petition for rehearing, *after* those judges had ruled against the defendant. *Id.* at 179.

This Court has also taken the same approach to defects in the appointment of prosecutors, which the court below failed to follow. In *United States v. Providence Journal Company*, 485 U.S. 694 (1988), the Court initially granted the government's petition for a writ of certiorari to review the reversal of a criminal contempt conviction. The Court later declined to review the merits of the issues raised in the petition, when the Court discovered that the petition had been filed and signed by a "special prosecutor" without authorization from the Solicitor General. Since only the Solicitor General has statutory authority under 28 U.S.C. § 518 to appear in the Supreme Court on behalf of the United States, the Court dismissed the writ for want of jurisdiction, holding: "Absent a proper representative of the government as a petitioner in this criminal prosecution,

jurisdiction is lacking and the writ of certiorari, heretofore granted, is now dismissed." *Providence Journal*, 485 U.S. at 707. *See also United States v. Durham*, 941 F.2d 886, 892 (9th Cir. 1991) ("[i]n every case addressing the authority of a Special Assistant United States Attorney the jurisdiction of the district court was in question") (citations omitted).

For all these reasons, the Court should grant certiorari to renew the Court of Appeals procedural holding, which wrongly blocked a decision on the merits of the important constitutional issues prevented.

II. The Petition should be granted because 28 U.S.C. § 546(d) constitutes an unconstitutional and unjustified legislative delegation of executive powers and duties to the judiciary.

This Court should grant certiorari because of the exceptional importance of the constitutional issues involved in this case.

A. The Purpose of the Appointments Clause

This case presents the exceptionally important question whether United States Attorneys are principal officers who must be appointed by the President and confirmed by the Senate. On that basis, Petitioner Colón-Muñoz has challenged the constitutionality of 28 U.S.C. § 546(d) on its face and as applied. The Appointments Clause of the Constitution requires Presidential appointment and Senate confirmation of all except "inferior officers." The Clause establishes two classifications of officials: (1) "principal Officers" who must be appointed only by the President with the advice and consent of the Senate; and (2) "inferior Officers" who may be appointed in a manner to be determined by Congress. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 888-892 (1991); *Morrison v. Olson*, 487 U.S. 654 (1988). The Clause is not a mere matter of "etiquette or protocol." *Buckley v. Valeo*, 424 U.S. 1, 125 (1976). It is an essential aspect of the separation of powers "woven into the [Constitution]." *Buckley*, 424 U.S. at 124. *Accord Edmond v. United States*, 520 U.S. 651, 117 S.Ct. 1573, 1579 (1997). The Clause serves two principal goals.

First, the Clause is meant to prevent "Congress from dispensing power too freely" by "limit[ing] the universe of eligible recipients of the power to appoint." *Freytag*, 501 U.S. at 880. Hence, it "preserves . . . the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* at 878. In this way, the Clause "acts as a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995).

Second, the Clause is aimed at achieving "a higher quality of appointments" by requiring both Presidential appointment and Senate confirmation of the selections. *Edmond*, 117 S.Ct. at 1579 (citations omitted). The "structural benefits" of the Appointments Clause can likewise be violated in two ways — by both "aggrandizement and abdication." *Weiss v. United States*, 510 U.S. 163, 188 (1994) (Souter, J., concurring).

The rights at stake in the Appointments Clause, therefore, extend beyond interbranch rivalries. Practices that evade the structural protections of the Appointments Clause deprive "*the public* of any realistic ability to hold easily identifiable elected officials to account for bad appointments." *Id.* at 191 (emphasis added). *See also Freytag*, 501 U.S. at 880 ("[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," and, therefore, "[n]either Congress nor the Executive can agree to waive th[e] structural protection[s]" the Clause provides).

Section 546(d) of the Judicial Code undermines these structural protections, because it permits federal judges to secretly select an important political officer of the United States and allows both the President and the Senate to "abdicate" their constitutionally-imposed duties. The consequence is the loss of public accountability. Interim U.S. Attorney Gil is a principal officer and the method used for appointing him is unconstitutional. In the instant case, Petitioner and all of the other citizens of Puerto Rico have lost their right to public accountability for the conduct of their chief federal law enforcement officer.

B. United States Attorneys are "Principal Officers"

Prior to *Edmond v. United States*, 520 U.S. 651, 117 S.Ct. 1573 (1997), this Court had not set forth a clear test for distinguishing between principal and inferior officers for purposes of the Appointments Clause. In *Morrison v. Olson*, 487 U.S. 654 (1988), this Court held that the independent counsel created by the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599, were inferior officers. The Court relied on several factors: (1) independent counsel could only be appointed and, thereafter, could still be removed by another principal officer, the Attorney General, and the judiciary; (2) independent counsel's duties and authority were limited in scope; and (3) independent counsels' tenure was limited. *Morrison*, 487 U.S. at 671-72. However, the Court disclaimed any attempt "to decide exactly where the line falls between the two types of officers." *Id.* at 487 U.S. at 671. In *Morrison*, the Court observed, without further comment, that similar issues are raised by the process created by § 546(d). *See* 487 U.S. at 675-76 & nn. 13-14. Notably, the Supreme Court mentioned the § 546(d) example in the course of pointing out that "Congress' power to provide for interbranch appointments of 'inferior officers' " is not "unlimited." *Id.* at 675.

In *Edmond*, the Supreme Court was called upon to determine whether the judicial appointment of civilians to the Coast Guard Court of Criminal Appeals by the Secretary of Transportation was constitutional under the Appointments Clause. Unlike the independent counsel at issue in *Morrison*, judges of the Court of Criminal Appeals were not limited in tenure or jurisdiction. They could be removed, however, without cause, by the Judge Advocate General. All their decisions were subject to review by a higher tribunal. *Edmond*, 117 S.Ct. at 1581. Accordingly, only one of the three factors relied upon in *Morrison* suggested that the judges were inferior rather than principal officers.

This Court held though that the judges were inferior officers. In so ruling, the Court for the first time expressly delineated a

standard for distinguishing between principal and inferior officers. This Court found that the principal distinction between principal and inferior officers was the power to hire, fire and direct the activities of the judges by officials other than the President. "The power to remove officers, we have recognized, is a powerful tool for control." *Edmond*, 117 S.Ct. at 1581 (citations omitted). Applying the criteria set forth in *Edmond* and *Morrison*, this Court should now assess whether United States Attorneys qualify as principal or as inferior officers.

While both the military judges in *Edmond* and the independent counsel in *Morrison* could be appointed and terminated by officials other than the President, no executive branch official, including the Attorney General, has ever had the power to hire and fire United States Attorneys. Since the earliest days of the Republic, the United States Attorneys and their predecessors have been appointed by the President with the advice and consent of the Senate, and they can only be fired by the President.

The nature of the power of United States Attorneys has deep historical roots. During the United States first eighty years there was no Department of Justice in the executive branch governing criminal law enforcement. The Office of the Attorney General and "district attorneys," today known as United States Attorneys, were created by the first Congress in the original Judiciary Act. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73 (1789) (hereinafter the "Judiciary Act"). Under the Judiciary Act, district attorneys were not subservient to the Attorney General in the field of criminal law enforcement and to this day that continues to be the case in most matters. The power of district attorneys to initiate and prosecute criminal cases was supreme. Originally, the Attorney General's role in handling criminal cases was extremely limited. The Judiciary Act gave the power to initiate and prosecute federal criminal prosecutions, including the right to appear before lower federal courts and grand juries, only to "district attorneys." Judiciary Act of 1789, § 35, 1 Stat. 92.

Moreover, the Judiciary Act did not give the Attorney General any authority to appoint, supervise or direct district attorneys. *See* BLOCK, *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L. J. 561 at 567 (1989). District attorneys did not report to the Attorney General until 1861, "and were not in any clear way answerable to him." *See* Lessig & Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 16 (1994) (footnotes omitted).

While the Judiciary Act created both the Office of the Attorney General and district attorneys, the Act did not specify how either category of official would be appointed. "The President nevertheless immediately assumed that responsibility, went to the Senate for advice and consent, presumably reading Article II, section 2 to support and perhaps require this approach." *See* Block, 1989 DUKE L. J. at 568, n. 24.

Federal criminal law enforcement remained both decentralized and in the control of district attorneys for almost a century. It was not until 1861 that Congress, for the first time, enacted legislation giving the Attorney General the authority to "conduct and argue any case in which the government is interested, in any court of the United States," now codified at 28 U.S.C. § 518, as well as some measure of control over the district attorneys. *See United States v. Hawthorne*, 449 F. Supp. 1048, 1051 (S.D. Cal. 1978) (citations omitted), *aff'd*, 626 F.2d 87 (9th Cir. 1980). However, "the 1861 legislation did not give the Attorney General as much control over the district attorneys as the statutes suggested." BLOCK, 1989 DUKE L. J. at 620, n. 187 (citations omitted).

In 1870, Congress finally created "the Department of Justice" and placed the Attorney General at its head. BLOCK, at 620 & n. 188 (citations omitted). The purpose of the legislation, however, was not to control the local district attorneys but to control the practice of using privately paid prosecutors to conduct criminal proceedings. More important, the expanded

authority of the Attorney General did not supersede the authority of United States Attorneys; it only paralleled it.

In 1906, Congress enacted what is now 28 U.S.C. § 515. The statute did not supplant the existing power of United States Attorneys, it extended similar powers to the Attorney General. Section 515 provides:

> to give the Attorney General, or to any officer in his Department or to any attorney specially employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.

House Judiciary Comm., Report on H.R. 17714, H.R. Rep. No. 2901, 59th Cong., 1st Sess. 1 (1906). Section 515(a) now provides:

> (a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Section 515(a) clearly states that United States Attorneys are separately "authorized by law" to institute and prosecute federal crimes under Chapter 35 of Title 28 of the United States Code. Similarly, 28 U.S.C. § 516 provides that "[e]xcept as otherwise authorized by law," the power to "conduct . . . litigation in which the United States . . . is a party" is "reserved" to "officers of the Department of Justice, under the direction of the Attorney General." And, 28 U.S.C. § 519 likewise states that "[e]xcept as otherwise authorized by law," the Attorney General is authorized to "supervise all litigation" to which the United States is a party and includes the power to "direct all

United States attorneys, assistant United States attorneys, and special attorneys appointed under § 543 of this title in the discharge of their respective duties." Despite abstract possibilities, as discussed in *United States v. Gantt*, 194 F.3d 987, 999-1000 (9th Cir. 1999), the Attorney General's statutory authority is rarely exercised.

The core reality is that the Attorney General and United States Attorneys are not so much members of a hierarchical structure but rather enjoy parallel realms of shared authority. Each office maintains a large degree of autonomy from the other. United States Attorneys remain the chief federal law enforcement officials within their judicial districts. Such is their power that they have the authority to decline a request to indict an individual in their district made by the Attorney General and they frequently do decline. Decisions as to allocation of personnel and public monies, who should be investigated, who should be accused and even who should be placed at risk of being put to death, are with limited exceptions unsupervised and unreviewed by the Attorney General or anyone else. That is exactly the way Congress intended it to be. For these reasons, the Court should grant certiorari and hold that a United States Attorney is a "principal officer".

C. Even if a United States Attorney could be considered an "inferior officer," his appointment by a Court violates the Separation of Powers Doctrine

Even if United States Attorneys could properly be classified as "inferior officers," that does not mean that the appointment power can be vested in the judiciary in the absence of any exigency. The provision in the Appointments Clause stating that the power to appoint inferior officers may be vested "in the Courts of Law" should not be construed to contradict the Framers' admonition that the separation of powers would be compromised if the other branches could appoint executive officers. *See The Federalist*, No. 51, at 321 (J. Madison); *Id.*

No. 72, at 436 (A. Hamilton).[4] Rather, the Clause should be interpreted to recognize that, in most instances, the power to appoint inferior officers "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 258 (1839).

The government has taken this very position before the Court in *Morrison*. There, the Solicitor General argued that the phrase "Courts of Law" in the Appointments Clause was only intended to permit courts to fill vacancies in their own staffs and did not authorize judicial appointment of Executive Branch prosecutors. *See* Brief of the United States, *Morrison v. Olson*, No. 87-1279 (U.S. April 1988), at 18-22.

This Court's holding in *Ex Parte Siebold*, 100 U.S. (10 Otto) 371 (1880), that there is no across-the-board separation of powers bar to inter-branch appointments does not, however, mean that Congress has absolute discretion to authorize them in other contexts. *See Morrison v. Olson*, 487 U.S. at 675-77 ("[w]e do not mean to say that Congress' power to provide for interbranch appointments of 'inferior officers' is unlimited"); *Buckley v. Valeo*, 424 U.S. 1 (1976) (declaring unconstitutional a statute allowing Congress to appoint members of the Federal Election Commission). In *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991), this Court approved the intrabranch appointment of certain "inferior" officials — special trial judges — by the Chief Judge of the United States Tax Court. In so doing, the Court was careful to point out that the case did "not involve an 'interbranch' appointment" such as the one in *Morrison*. *Freytag*, 501 U.S. at 883.

The Executive has "exclusive authority and absolute discretion to decide whether to prosecute a case." *Nixon*, 418

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4. The Supreme Court has noted that "[t]he opinion of [*The Federalist*] has always been considered of great authority . . . and the part two of its authors performed in framing the constitution put it very much in their power to explain the views with which it was framed." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 120, 187, 5 L.Ed. 257 (1821).

U.S. at 693. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

The incongruity of judicial entanglement in the appointment of United States Attorneys is made manifest when one compares the instant case with the facts underlying *Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison*, this Court ruled that there was no "incongruity" in permitting members of the judiciary to appoint independent counsel. This was so for three critical reasons that compel the opposite conclusion in this case.

First, the Ethics in Government Act was designed to remove the apparent conflict of interest stemming from Executive-led investigations into high-ranking members of the Executive Branch. "If [Congress] were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch." *Morrison*, 487 U.S. at 677. Here, no intrabranch conflict existed to justify Mr. Gil's appointment, only a mere vacancy which could have been filled by the Attorney General.

Second, the Independent Counsel legislation expressly made the judges in charge of the appointments "ineligible to participate in any matters relating to an independent counsel they have appointed." *Id.*, referencing 28 U.S.C. § 49(f). The Court noted that the disqualification provisions were important not only to prevent Article II problems, but also under Article III. "We think both the special court and its judges are sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the judiciary such as would render the Act invalid under Article III." *Morrison*, 487 U.S. at 684.

In the instant case, both Article II and Article III have been violated. Section 546(d) authorized federal judges in Puerto Rico to impose their will on the selection of an interim U.S. Attorney for Puerto Rico, a matter which could hardly be less "judicial"

in character. As a result, Petitioner was prosecuted and the citizens of Puerto Rico are saddled with a U.S. Attorney who responds to no one. *United States v. Peralta-Ramirez,* 2000 Westlaw 193249 (D. P.R. filed 2/11/00). Additionally, unlike the limited matter at issue in *Morrison*, every case that Mr. Gil has authorized for prosecution or defended in the name of the United States in the last six years, be it civil or criminal, must be ventilated before the very judges who appointed Mr. Gil, with almost no exceptions. Unlike the situation allowed by the Ninth Circuit in *Gantt*, *supra*, the position of "interim" United States Attorney in Puerto Rico has become *de facto* permanent.

Third, the judicial power to appoint under the legislation in *Morrison* was deemed to be nothing more than "incidental." *Id.* at 697. The Special Division of judges have "no power to appoint an independent counsel *sua sponte*" but can only do so "upon the specific request of the Attorney General." *Id.* The Division can do nothing if the Attorney General refuses to seek an appointment. *Id.* In the instant case, Petitioner believes that the Executive Branch did attempt to act but the Attorney General's authority and discretion was preempted by the authority granted federal judges under Section 546(d).

Morrison and this case are polar opposites. For that reason, Petitioner's request for certiorari should be granted.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AND DECIDED OCTOBER 1, 1999

[192 F.3d 210]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1684.

UNITED STATES,

Appellee,

v.

Ramiro L. COLÓN-MUÑOZ,

Defendant, Appellant.

Heard April 6, 1999.

Decided October 1, 1999.

* * *

Before LYNCH, Circuit Judge, BOWNES, Senior Circuit Judge, and LIPEZ, Circuit Judge.

LIPEZ, Circuit Judge.

We consider in this appeal criminal convictions relating to a real estate transaction in Puerto Rico in the 1980s. The defendant, Ramiro L. Colon-Munoz, formerly President of

Ponce Federal Bank, was convicted of misapplication of bank funds (five counts), bank fraud, making a false entry on a loan document, making a false statement on a loan application, fraudulently benefitting from a bank loan, and conspiracy. The real estate at issue, a farm called La Esmeralda ("the farm" or "La Esmeralda") was also forfeited. Colon now raises a variety of objections to the convictions and forfeiture, beginning with the claim that his indictment was invalid because of interim United States Attorney Guillermo Gil's participation before the grand jury pursuant to an unconstitutional judicial appointment. Colon also challenges the sufficiency of the evidence to support his convictions and claims that the forfeiture of La Esmeralda violated the Ex Post Facto Clause of the United States Constitution.

Although we conclude that Colon waived his challenge to the validity of the indictment, we agree that there was insufficient evidence to support his convictions on four of the five misapplication counts and the false statement count, and that the forfeiture of the real estate violates the Ex Post Facto Clause of the Constitution. We affirm the convictions on one count of misapplication, and on the counts of bank fraud, false entry, fraudulently benefitting from a bank loan, and conspiracy.

I. Background

We have already considered many of the issues at hand in the appeal of Colon's co-defendant, Jose Blasini-Lluberas. As the scheme at issue was set forth in great detail in our opinion in that case, *United States v. Blasini-Lluberas*, 169

F.3d 57, 60-62 (1st Cir.1999), we offer here a limited statement of the facts which the jury could have found from its review of the evidence, supplemented by the specifics of Colon's involvement where necessary.

On July 15, 1987, Colon and his wife purchased La Esmeralda from thirteen members of the Usera family who had inherited the farm. Colon paid $83,340 at the closing and the balance of $472,260 was due nine months later on April 14, 1988.[1] As security for the balance of the purchase price, Colon granted the Usera family a mortgage on the property.

Following Colon's purchase of the farm, but prior to the due date of Colon's outstanding $472,260 obligation, four members of the Usera family approached Colon requesting money.[2] Each family member had a specific reason for requesting a loan but, generally speaking, the family members were seeking funds to satisfy obligations unrelated to the sale of the farm. Colon agreed to help them, sending the family members to see Blasini, then an executive vice-president of Ponce Federal Bank ("the bank"), and instructing him to assist each of them in securing a loan from the bank. As vice-president of the bank, Blasini was authorized to approve unsecured loans up to $50,000 and secured loans up to $100,000. Blasini authorized the loans,

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1. Each of the thirteen members of the family was owed a pro rata share of the purchase price according to each member's inheritance share.

2. The four family members were Monseratte Usera, Ana Usera, Carmen Maduro Usera and Vicente Usera Tous.

ranging from $11,000 to $20,000, subject to a standard rate of interest and a due date. None of the loan applications included a financial statement or credit history. Each family member, however, executed partial assignments of their mortgage interests in the farm as security for the loans. Although the partial assignments were signed by both Blasini and Colon, they were not included in the loan file. The stated purpose for the loans was personal; the means of repayment was the sale of a farm. Because the loans did not exceed $50,000, their approval did not require collateral as a matter of bank policy.

When Colon's debt to the Usera family came due on April 14, 1988, he was unable to satisfy his obligation. On April 19, 1988, another member of the Usera family, Consuelo Garcia-Gomez, went to the bank and demanded payment of her share of the purchase price. Consuelo Garcia-Gomez was entitled to $200,000, the largest share of the inheritance. Wendell Colon, Colon's brother, told Consuelo Garcia-Gomez that the money was not immediately available. She then asked for $100,000. Thereafter, Blasini brought Consuelo Garcia-Gomez to a loan officer and instructed the officer to disburse a $100,000 loan to her. The information in her loan application was provided to the loan officer by Blasini and the application stated that collateral for the loan was a partial assignment of Consuelo Garcia-Gomez's mortgage interest in the farm. The listed purpose of the loan was the purchase of an apartment. On the loan application, directly above Blasini's signature, Blasini wrote,[3] "discussed and agreed to by attorney R.L.

3. Precisely when Blasini made this notation is uncertain. *See infra.*

Colon."[4] At trial Consuelo Garcia-Gomez explained that, although she signed loan documents to receive the $100,000, she did not go to the bank for the purpose of obtaining a loan and she never read the loan documents before signing them. She maintained that the $100,000 was partial payment of the money owed to her rather than a loan.

On May 13, 1988, Colon paid the balance of the purchase price of the farm to the Useras. Colon wrote two sets of checks from his personal account. The first set paid off the bank loans of Monserrate Usera, Ana Usera, Carmen Maduro, Vicente Usera and Consuelo Garcia-Gomez. He listed the appropriate amount of their outstanding debts, including the interest that had accrued, and named both the bank and the borrower as joint payees. The second set of checks paid each family member the balance of what he or she was owed. They then signed a cancellation of the mortgage.

When members of the Usera family presented the checks at the bank for immediate payment, Colon's personal account had insufficient funds to pay all of the checks. Blasini authorized a bank officer to substitute official bank checks for Colon's personal checks. The official bank checks were debited against Colon's personal checking account. At the close of business on May 13th, Colon's personal account was overdrawn by $122,930.

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4. At trial, Marisel Marrero, the assistant bank manager who identified this notation as Blasini's, read the name in the notation as "R.C. Colon," apparently reading a curved "L" as a "C." Marrero made clear, however, that she was referring to the president of the bank and defendant in this case, Ramiro L. Colon, and we refer here to his correct name in quoting the notation. In *Blasini-Lluberas*, 169 F.3d at 61-62, we rendered the statement as Marrero read it.

The following business day, May 16, Colon deposited $492,394 in his personal account from the proceeds of a $500,000 loan he obtained from the Royal Bank of Puerto Rico ("Royal Bank"). A month before, in April, Colon had applied for the loan, initially contacting the Vice President of Royal Bank by phone to discuss the possibility of such a loan. Notwithstanding the fact that in April the Useras still had a mortgage on the farm, Colon and his wife prepared a mortgage deed which stated that Royal Bank was granted a first mortgage on La Esmeralda. The mortgage deed was filed at the registry of deeds on April 19, 1988. However, in the financial documents submitted to Royal Bank, the Usera family's pre-existing first mortgage on the property was fully disclosed. The loan was approved on May 4th but was not actually disbursed until May 16th, three days after the Useras released their mortgage on the farm.

Two years later, in August of 1990, Colon received a severance package from Ponce Federal Bank in the amount of $615,500. With those monies, he paid off the balance of his loan from Royal Bank.

In 1995, Colon was indicted on multiple counts relating to these transactions. Following a trial, Colon was convicted on five counts of misapplication of bank funds under 18 U.S.C. § 657, one count of bank fraud under 18 U.S.C. § 1344, one count of false entry under 18 U.S.C. § 1006, one count of benefitting, directly or indirectly, from the loan transactions in question under 18 U.S.C. § 1006, one count of false statement under 18 U.S.C. § 1014, and one count of conspiracy under 18 U.S.C. § 371. The jury also returned a verdict of forfeiture as to Colon's interest in La Esmeralda under 18 U.S.C. § 982(a)(2).

Colon filed a post-trial motion for a judgment of acquittal under Fed.R.Crim.P. 29(c), challenging the sufficiency of the evidence and, for the first time, the validity of the indictment because of interim United States Attorney Guillermo Gil's participation before the grand jury. He argued that Gil's judicial appointment was unconstitutional and sought discovery on the circumstances of the appointment. The motion for discovery and the motion for a judgment of acquittal were denied.

Colon was sentenced to twenty-one months imprisonment followed by two years of supervised release. He was also fined $20,000 and his interest in La Esmeralda was forfeited.

II. The Appointment of the Interim United States Attorney

As noted, Colon raised for the first time in his motion for a judgment of acquittal a claim that Guillermo Gil's judicial appointment as the interim United States Attorney for the District of Puerto Rico was constitutionally invalid.[5] Specifically, he maintained that 28 U.S.C. § 546(d), which

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5. On May 3, 1993, Attorney General Reno appointed Assistant United States Attorney Charles Fitzwilliams to be interim United States Attorney pursuant to her authority under 28 U.S.C. § 546(a). The President did not nominate and appoint another candidate within 120 days and Fitzwilliams' appointment expired on September 4, 1993. On September 9, 1993, the District Court of the District of Puerto Rico appointed Guillermo Gil as the interim United States Attorney pursuant to its authority under 28 U.S.C. § 546(d). As of this appeal, Gil remains the interim United States Attorney.

allows the district court to appoint an interim United States Attorney, violates both the Appointments Clause of the United States Constitution, art. II, § 2, cl. 2, and the principles of separation of powers. On the basis of this alleged constitutional violation, Colon argued that Gil's participation in the grand jury proceedings that led to Colon's indictment violated Fed.R.Crim.P. 6(d), which provides that only attorneys for the government may be present while the grand jury is in session. Because Gil was improperly appointed, Colon argued that Gil was not an attorney for the government who was authorized to be present before the grand jury. On appeal, Colon reasserts this argument and seeks the dismissal of the indictment.

We do not reach the merits of Colon's claim. The rules unmistakably require that "objections based on defects in the institution of the prosecution" or "defects in the indictment . . . must be raised prior to trial." Fed.R.Crim.P. 12(b). Colon first raised his constitutional objection to Gil's participation before the grand jury in his post-trial motion for a judgment of acquittal. Although the rules permit a defendant to show "cause" for his failure to raise his objections pre-trial, see Fed.R.Crim.P. 12(f) ("the court for cause shown may grant relief from the waiver"), Colon's showing is unpersuasive.

Colon protests that he only learned of Gil's involvement in the grand jury proceedings through the Jencks Act materials he received during the trial.[6] Nonetheless, he failed

6. Pursuant to the Jencks Act, 18 U.S.C. § 3500, a defendant is entitled to government documents for assistance in cross-examining witnesses in order to impeach them for prior inconsistent statements.

to file any objections at the time he received the Jencks material, waiting instead for a jury verdict and the filing of his motion for a judgment of acquittal. Moreover, Colon was well aware of Gil's personal involvement in this case pre-trial. Defense counsel met personally with Gil on one occasion and phone calls and letters were exchanged relating to trial preparation and discovery issues. Gil's name appeared on the indictment.[7] Despite these facts, Colon did not seek any pre-trial discovery to investigate the nature of Gil's participation in the grand jury proceedings pursuant to the procedures set forth in Fed.R.Crim.P. 6(e)(3)(C)(i),(ii).[8] Under these circumstances, we conclude that Colon has not demonstrated cause for his failure to raise his objection pre-trial and we will not grant relief from his waiver.

In an effort to escape the consequences of waiver, Colon argues that his challenge to the appointment of the interim United States Attorney on the basis of the Appointments Clause of the United States Constitution and separation of

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7. Although Gil's name appeared on the indictment, the indictment was actually signed by Assistant United States Attorney Vega.

8. Rule 6 provides in pertinent part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
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> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

powers principles is jurisdictional and cannot be waived. See Fed.R.Crim.P. 12(b)(2) (objections "that [the indictment] fails to show jurisdiction in the court . . . shall be noticed by the court at any time during the pendency of the proceedings"). We disagree with Colon's characterization of his claim.

In *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), the Supreme Court recognized that a challenge under the Appointments Clause to the propriety of a statute which permitted the judicial appointment of special trial judges in the Tax Court raised both "structural" and "political" concerns. Notwithstanding the structural and political implications of the underlying claim, the Court characterized it as nonjurisdictional. *See id.* at 878-79, 111 S.Ct. 2631; *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962)(including Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections).[9]

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9. As used in cases like *Freytag* and *Glidden*, the word "structural" literally refers to the structure of the federal government as envisioned in the Constitution. For example, the Court writes in Freytag: "The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." *Freytag*, 501 U.S. 868, 878, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). In a case such as *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), applying a harmless error analysis to a jury instruction that omitted an element of the offense, the word "structural" has a different meaning. There it refers to those

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Although the challenge in *Freytag* concerned the judicial appointment of other judges, and the challenge in this case concerns the judicial appointment of an interim United States Attorney, we see no basis for characterizing this claim differently. The *Freytag* Court accepted the proposition that "[t]he alleged defect in the appointment . . . goes to the validity of the [court] proceeding." *Id.* at 879, 111 S.Ct. 2631. Colon made a similar claim here. His challenge to the constitutionality of Gil's appointment as interim United States Attorney was a nonjurisdictional claim and it was waived. *Cf. United States v. Gantt*, 179 F.3d 782, 786-87 (9th Cir.1999) ("An infirmity in the United States Attorney's appointment would not generally affect the jurisdiction of this court so long as a proper representative of the government participated in the action. . . . [T]he

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constitutional errors, present in "a very limited class of cases," *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), which "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' " *Neder*, 119 S.Ct. at 1833 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Such structural errors include complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, or a defective reasonable doubt instruction. *See id.* The alleged "structural" error at issue in this case involves the structure of the federal government rather than the structure of the criminal trial process as a reliable means of determining guilt or innocence. Some of the arguments advanced on behalf of Colon relating to the interim judicial appointment of the United States Attorney blur these different meanings of "structural."

constitutionality of § 546(d) would not affect the validity of indictments . . . as indictments need only be signed by an attorney for the government.").[10]

We have used the term "waiver" in evaluating the timeliness of Colon's challenge to Gil's participation before the grand jury because Rule 12(f) uses that term. Pointing to the use of that term in Rule 12, the government, relying on *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) notes that "waiver" is different from "forfeiture." Since waiver extinguishes plain error review, the government argues, and since Rule 12(f) refers to waiver, the government contends that the rule itself precludes plain error review here.

We need not resolve this issue given the Supreme Court's decision in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), concluding that alleged violations of Rule 6(d), not raised pre-trial, are rendered harmless as a matter of law by a subsequent guilty verdict at trial. Colon's constitutional objections to Gil's appointment are the predicate for his claim that Gil's presence before the grand jury violated Rule 6(d).[11] As a remedy for this error, Colon

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10. As noted, Assistant United States Attorney Vega signed the indictment and participated fully throughout Colon's trial.

11. Colon confirms in his supplemental post-argument reply brief that his argument about the unconstitutionality of Gil's appointment is available to him only because of Gil's participation in the grand jury proceedings that led to his indictment, and hence, as he sees it, the violation of grand jury rules. Colon states that he "has never suggested that the present issue is properly available to

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asks for dismissal of the indictment. *Mechanik* precludes any such relief.

In *Mechanik*, two government witnesses testified in tandem before the grand jury, which ultimately indicted both defendants on various drug related offenses. *See id.* at 67, 106 S.Ct. 938. At trial, once the defendants learned of the alleged violation, the defendants objected to the joint presence of the two witnesses and moved for a dismissal of the indictment on the basis that the "simultaneous presence of the two agents had violated Federal Rule of Criminal Procedure 6(d)." *Id.* at 68, 106 S.Ct. 938. The district court took the motion under advisement. Following a guilty verdict, the district court denied the motion on the basis that, notwithstanding any violation of Rule 6(d), there had been no harm to the defendants given the subsequent guilty verdict. The Supreme Court agreed with the district court's reasoning, concluding that "however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict render[s] harmless any conceivable error in the charging decision that might have flowed from the violation." *Id.* at 73, 106 S.Ct. 938. The Supreme Court explained its reasoning:

> The rule protects against the danger that a defendant will be required to defend against a

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any defendant indicted in the district, or even in every case in which Mr. Gil has set foot inside a grand jury room." The arguments raised by the National Association of Criminal Defense Lawyers (the "Association") in its amicus brief seem to have these larger implications disclaimed by Colon.

> charge for which there is no probable cause to believe him guilty. The error involving rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they are charged. But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Id. at 70, 106 S.Ct. 938 (citation omitted).

Mechanik's reasoning applies to this case. As a matter of law, any error in the charging decision of the grand jury was rendered harmless by the verdict and Colon cannot claim that Gil's presence before the grand jury entitles him to a dismissal of the indictment.[12] We caution, however, that this conclusion implies no judgment about the importance of the issues raised by Colon or the Association in their challenge

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12. To the extent that Colon raises objections to Gil's participation at trial, we review such claim for plain error given Colon's failure to raise any such objection at trial. *See* Fed.R.Crim.P. 52(b). Colon makes no specific objection to Gil's actual participation at trial, other than the alleged error in his appointment. That is, he does not even try to demonstrate that Gil's participation "affected the outcome of the district court proceedings," as required by *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). This failure defeats any claim of plain error.

to the constitutionality of the lengthy interim judicial appointment of the United States Attorney. Aided by the long and thoughtful brief of the Association, they claim, as already noted, that 28 U.S.C. § 546(d) is unconstitutional on Appointments Clause and separation of powers grounds, and claim further that § 546(d) is unconstitutional as applied because the district court's interim appointment of Gil has become de facto permanent. These are serious issues. Timely raised, they would merit careful attention.

III. Sufficiency of the Evidence

We turn to a discussion of the challenges to the sufficiency of the evidence. In evaluating such claims, we review the evidence as a whole, together with all reasonable inferences therefrom, in a light most favorable to the government. *See United States v. Mangual-Corchado*, 139 F.3d 34, 44 (1st Cir.1998). Viewing the evidence in this light, "[w]e review de novo the district court's determination that the jury reasonably found 'each element of the crime to have been proven beyond a reasonable doubt.' " *Id.* (quoting *United States v. Houlihan*, 92 F.3d 1271, 1295 (1st Cir.1996)). Where "an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence" we must reverse a conviction. *Blasini-Lluberas*, 169 F.3d at 62 (alteration omitted).

Appendix A

A. Misapplication of bank funds (Counts Two through Six)[13]

We conclude, as we did in *Blasini-Lluberas, see id.*, that there was insufficient evidence from which a reasonable jury could conclude that the loans to Ana Usera, Monserrate Usera, Carmen Maduro Usera and Vicente Usera Tous constituted a criminal misapplication of bank funds. *See id.* at 62-64. Given our conclusion in Blasini-Lluberas that there was sufficient evidence to convict Blasini on the count of misapplication relating to Consuelo Garcia-Gomez, we must consider whether there was also sufficient evidence to convict Colon of that offense.

As discussed in detail in *Blasini-Lluberas*, when Consuelo Garcia- Gomez went to Ponce Bank in April 1988 and demanded payment, Colon's $200,000 debt to her was past due. She did not request a loan. At the bank she initially met with Colon's brother who informed her that the money was unavailable. She suggested payment of $100,000. Thereafter, Blasini took Consuelo Garcia-Gomez to meet

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13. The statute provides in pertinent part:

> Whoever, being an officer, agent or employee of [a] savings and loan corporation or association authorized or acting under the laws of the United States . . . embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution [is guilty of misapplication of bank funds].

18 U.S.C. § 657.

with Marisel Marrero, the assistant bank manager,[14] and instructed her on the details of the loan application. *See id.* A $100,000 loan was then disbursed to Consuelo Garcia-Gomez that day. The notation on the loan application admitted in evidence read "discussed and agreed to by attorney R.L. Colon."

Although the loans to the four other Usera family members were not misapplication of bank funds, Colon was "playing it close to the line" in his dealings with them. *Id.*, 169 F.3d at 64. When Consuelo Garcia-Gomez arrived at the bank demanding payment of the already-matured debt, the jury could have reasonably concluded that Colon crossed the line by deceptively using Ponce Bank funds to satisfy his private debt under the guise of a bank loan to a woman who did not want a loan. The notation Blasini included on Consuelo Garcia-Gomez's loan application, "discussed and agreed to by attorney R.L. Colon," provided ample evidence from which the jury could infer that Colon was personally involved in the illegal transaction with Consuelo Garcia-Gomez, just as he had been personally involved in arranging the loans to other members of the Usera family with the help of Blasini. This wrongful use of bank money to satisfy a private debt, carried out with an intent to deceive the bank about the true nature of the transaction, involved all of the essential elements of the crime of misapplication.

On appeal, Colon argues that Blasini's notation on Consuelo Garcia-Gomez's loan document did not appear

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14. In *Blasini-Lluberas*, we referred to Ms. Marrero as a loan officer.

until a month after the loan was processed, and hence there was insufficient evidence of his involvement in the loan. We disagree. The jury could have reasonably concluded that Blasini accurately recorded Colon's contemporaneous involvement in the loan even if Blasini's notation was subsequent in time. Considering the totality of the circumstances, there was sufficient evidence to convict Colon for the misapplication of bank funds on Count Six.

B. Bank fraud[15] (Count Seven)

To establish bank fraud pursuant to 18 U.S.C. § 1344,[16] the government must establish that the defendant (1) engaged in a scheme or artifice to defraud or made false representations to obtain money from (2) a financial

15. 18 U.S.C. § 1344 provides in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice —
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises . . . [is guilty of bank fraud].

16. As we did in *Blasini-Lluberas*, we refer to the relevant statutes in their current form throughout this opinion. Although each of the relevant statutes has been amended since the date of the commission of the alleged crimes, the amendments do not bear directly on the issues on appeal. For the most part, changes to the statutes concerned punishment for — not elements of — the offense. Of course, for the purposes of sentencing on remand, the statutes as they appeared at the time of the offense control.

institution and (3) did so knowingly. A scheme or artifice to defraud is defined to include "any plan, pattern or [course] of action . . . intended to deceive others in order to obtain something of value." *United States v. Brandon*, 17 F.3d 409, 424 (1st Cir.1994) (quoting *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir.1987)). The evidence was sufficient for the jury to conclude that Colon, with the assistance of Blasini, knowingly engaged in a scheme to obtain bank funds, deceitfully characterized as a loan, to satisfy $100,000 of his outstanding obligation to Consuelo Garcia-Gomez. The structuring of the transaction as a loan was the scheme to defraud. Further, as with the misapplication count, the notation on the back of the loan documents sufficiently demonstrates Colon's specific involvement in the sham loan transaction.[17]

After Colon was sentenced and his appeal submitted to us, the Supreme Court determined that materiality is an element of the fraud perpetrated by "a scheme or artifice" under 18 U.S.C. § 1344. *See Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1839, 144 L.Ed.2d 35 (1999). Not having had the benefit of Neder, the district court did not instruct the jury that in order to convict it had to find that the "scheme or artifice to defraud" involved material

17. As we explained in Blasini-Lluberas, we will not vacate the bank fraud conviction on the basis of our conclusion that four of the five loans were legitimate. The government charged one count of bank fraud based on five separate loan transactions, each of which could have served as the basis for the fraud allegation. *See Blasini-Lluberas*, 169 F.3d at 65; *Brandon*, 17 F.3d at 422. So long as there was sufficient evidence from which a jury could conclude that one of the transactions constituted bank fraud, the conviction stands.

falsehoods. Because this rule was announced while Colon's conviction was on direct appeal, the newly-announced rule applies to his appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the rule constitutes a 'clear break' with the past"). We review the district court's omission of the materiality element for plain error because Colon did not claim that materiality was an element before the district court. *See Johnson v. United States*, 520 U.S. 461, 465-66, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). We apply this standard even though there has been a change in the law since trial and defense counsel's failure to object was appropriate at the time. *See id.*; *see also United States v. Collins*, 60 F.3d 4, 7 (1st Cir.1995) (applying plain error review to claim raised for the first time on appeal even when failure to object "most likely was based on counsel's correct understanding of the law at the time").[18]

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18. Oddly, neither party has availed itself of Rule 28(j) of the Federal Rules of Appellate Procedure permitting the parties to cite "pertinent and significant authorities" that come to a party's attention after oral argument but before decision. That rule, however, only permits a party to state "without argument the reasons for the supplemental citations." Given the importance of the materiality issue to the fair disposition of the bank fraud conviction, the limited scope of a Rule 28(j) filing, and our own awareness of the relevant authority, we deem it appropriate to address the materiality issue even though the parties did not bring the Neder case to our attention.

Before we can correct an error pursuant to the plain error standard, we must conclude that there was error, that the error was plain and that the error affected substantial rights. *Johnson*, 520 U.S. at 466-67, 117 S.Ct. 1544 (citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). If these three conditions are met, we "may then exercise [our] discretion to notice a forfeited error, but only if the error . . . seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467, 117 S.Ct. 1544 (internal quotation marks omitted).

In light of *Neder*, there is no doubt that the court's instruction on bank fraud, omitting any reference to materiality, was an error and that such error was plain. In *Johnson*, the Supreme Court held that where the law at the time of trial is contrary to the law at the time of the appeal, "it is enough that an error be 'plain' at the time of appellate consideration." *Id.* at 468, 117 S.Ct. 1544.

The requirement under Rule 52(b) that the plain error "affect substantial rights" has been interpreted to mean that "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. 1770. This standard is substantially the same as the standard applied in a harmless error analysis under Rule 52(a), except that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* Colon's deception about the sham loan to Consuelo Garcia-Gomez was material in the relevant sense, *i.e.*, a "reasonable man would attach importance to [it] in determining his choice of action in the transaction in question." *Neder*, 119 S.Ct. at 1840 n. 5

(quoting Restatement (Second) of Torts § 538 (1976)). Officials at the bank reviewing this transaction would undoubtedly be influenced in their view of its appropriateness by Colon's deception about Consuelo Garcia-Gomez's demand for payment of his overdue debt. At the very least, Consuelo Garcia-Gomez's anger about Colon's ploy, described by witnesses at the trial, created the risk that she would refuse to treat the loan transaction contrived by Colon as a loan. Colon's deception about the purpose of the loan to Consuelo Garcia-Gomez was inescapably material, and hence, like the Supreme Court in Neder, we conclude beyond a reasonable doubt that the jury verdict on the bank fraud count would have been the same even if the court had given an instruction on materiality.

C. False entry (Count Eight)[19]

Colon was charged with making a false entry with the intent to defraud a banking institution in violation of § 1006. The statute provides that any employee of an insured bank who makes a false entry in any statement to such institution with the intent to defraud such institution commits a

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19. 18 U.S.C. § 1006 provides in pertinent part:

> Whoever, being an officer [of a federally insured banking institution] . . . with intent to defraud any such institution . . . or to deceive any officer, auditor, examiner or agent of any such institution . . . makes any false entry in any book, report or statement of or to any such institution . . . [is guilty of a crime].

violation. *See* 18 U.S.C. § 1006.[20] In *Blasini-Lluberas*, we assumed arguendo that materiality is an element of the crime of false entry and concluded that there was sufficient evidence for a reasonable jury to decide that Blasini had made a material false entry on Consuelo Garcia-Gomez's loan application by stating to Marisel Marrero, the bank officer who prepared the documentation for Consuelo Garcia-Gomez's loan, that the purpose of her loan was the purchase of an apartment. *See Blasini-Lluberas*, 169 F.3d at 66.

Colon did not fill out Consuelo Garcia-Gomez's loan application, nor was he present when the notation was made on the document. This absence of direct participation by Colon does not end the analysis, however. Colon and Blasini were charged with aiding and abetting[21] each other in making

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20. As we discussed in *Blasini-Lluberas*, although the general parameters of § 1006 are clear, the Supreme Court has yet to decide whether "materiality" is an element of this statute: that is, whether the government must show that the defendant knowingly and willfully made or caused to be made a false entry concerning a material fact in any statement to the institution. *See United States v. Parks*, 68 F.3d 860, 865 (5th Cir.1995) (holding that materiality is an element of 18 U.S.C. § 1006). *But Cf. United States v. Harvard*, 103 F.3d 412, 417-20 (5th Cir.1997) (holding that materiality is not an element of 18 U.S.C. § 1005, a nearly identical statute).

21. 18 U.S.C. § 2 provides in relevant part that:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(Cont'd)

a false entry on a loan document. A defendant is guilty of aiding and abetting where the government can show that (1) "the principal committed the underlying substantive crime" and (2) "the defendant associated himself with the venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed." *United States v. Loder*, 23 F.3d 586, 590-91 (1st Cir.1994). "It is well settled that a culpable aider and abetter need not perform the substantive offense, be present when it is performed, or be aware of the details of its execution." *United States v. Garcia-Rosa*, 876 F.2d 209, 217 (1st Cir.1989), *vacated on other grounds sub nom. Rivera-Feliciano v. United States*, 498 U.S. 954, 111 S.Ct. 377, 112 L.Ed.2d 391 (1990). Moreover, the government "need not preclude every reasonable hypothesis in order to sustain a conviction," and may prove its case through circumstantial evidence. *Loder*, 23 F.3d at 591.

Accordingly, even though Blasini actually caused the making of the false entry on the loan application about the apartment, Colon too may be punished for false entry if he is guilty of aiding and abetting Blasini in that effort. The transaction with Consuelo Garcia-Gomez on April 19, 1988, was unusual. Marisel Marrero, the assistant bank manager, testified that she could not recall a $100,000 loan that was disbursed the same day the loan application was received. That application process began with a handwritten loan

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> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

application for which Blasini provided the information. That information included the statement that the purpose of the loan was the purchase of an apartment. This handwritten copy was then typed up. Apparently there was a problem with the review of the loan documentation within the bank, and the loan department sent the file back on May 9 for further documentation, including an indication of Blasini's approval of the loan. On May 11, an unidentified bank official responded with a written memorandum indicating that the loan had been approved by Blasini on April 19, orally and by signature, and that the original documents were being sent to him to sign. According to Colon, the document with the comment by Blasini asserting that the loan with Consuelo Garcia-Gomez had been "discussed and agreed to by attorney R.L. Colon" was not received back at the loan department until May 17.[22]

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22. The information set forth in the above paragraph is drawn largely from documents introduced into evidence in Spanish which were not translated. Colon discusses these documents at length in his reply brief in an apparent effort to distance himself from Blasini's actions in extending the sham loan to Consuelo Garcia-Gomez. In using these documents, Colon notes that they do not comply with our local rule 30.7 which states that "the court will not receive documents not in the English language unless translations are furnished." Despite the wording of the rule, we retain discretion to waive the requirements of the rule in appropriate circumstances. *See Rivera-Gomez v. de Castro*, 843 F.2d 631, 634 n. 4 (1st Cir.1988). Given Colon's extensive reliance on these documents in the reply brief, and given the relative ease of understanding those documents without the benefit of a translation, we deem it appropriate to consider these portions of the record on appeal. As it happens, despite Colon's arguments, we find these documents more inculpatory than exculpatory.

Appendix A

Although there is uncertainty in the record about precisely when Blasini added the notation about the discussion with and agreement of Colon, we have already noted that a jury could have reasonably concluded that Blasini accurately recorded Colon's contemporaneous involvement in the loan with Consuelo Garcia-Gomez even if Blasini's notation was subsequent in time. A jury could further infer that the false entry had been specifically discussed with Colon for three reasons. The bank form for the loan required that a statement of purpose be given for a loan of this size. It is a fair inference that Colon, as president of the bank, was aware of that requirement. Secondly, this purported loan to Consuelo Garcia-Gomez was in fact a sham transaction, designed to pay off a portion of Colon's debt to Garcia-Gomez. That purpose obviously could not be stated. Colon and Blasini would have anticipated the need to contrive some other statement of purpose. Third, the notation is on the second page of a document containing the false entry and it is reasonable to conclude that Blasini and Colon discussed that same document. Under these circumstances, a reasonable jury could conclude beyond a reasonable doubt that Colon associated himself with Blasini in the venture to make a false entry on Consuelo Garcia-Gomez's loan application and that he sought by his actions to make this illegal act succeed. *See United States v. Loder*, 23 F.3d 586, 590-91 (1st Cir.1994).

D. Fraudulently benefitting from a loan (Count Nine)[23]

Colon claims that there was insufficient evidence from which a jury could convict him of improper participation in the loan to Consuelo Garcia-Gomez in violation of § 1006. To convict on this crime, the government must demonstrate "(1) the defendant's connection with a protected institution; (2) direct or indirect receipt of some benefit from a bank transaction; and (3) intent to defraud." *United States v. Brechtel*, 997 F.2d 1108, 1115 (5th Cir.1993). In *Brechtel*, the court explained that "a fiduciary who benefits . . . by knowingly subordinating the institution's interests to his own in a transaction for which he has responsibility acts with the 'intent to defraud' required by § 1006." *Id.* at 1116. The government can demonstrate an intent to defraud through circumstantial evidence. *See id.* "An inference of intent to defraud arises where a responsible bank insider acts to procure a transaction which he knows will benefit him, without disclosing his interest therein." *Id.*

As President of the bank, Colon was obviously connected with the financial institution. The sham loan to Consuelo Garcia-Gomez was of great benefit to him. His debt to her

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23. 18 U.S.C. § 1006 provides in pertinent part:

> "Whoever, being an officer [of a federally insured banking institution] . . . with intent to defraud . . . any corporation, institution or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of such corporation . . . [is guilty of a crime]."

was outstanding and he was able to use bank funds to make a partial payment to her. His prior involvement with the family and the notation on the back of the loan document demonstrate his involvement in the transaction even though he was not present at the time the loan was signed. As noted in Brechtel, a jury may infer Colon's attempt to defraud the bank from the fact that he acted to "procure a transaction which he [knew would] benefit him, without disclosing his interest therein" to the bank. *Id.* at 1116. There was sufficient evidence to support his conviction for fraudulently benefitting from the loan to Consuelo Garcia-Gomez in violation of § 1006.

E. False statement (Count Eleven)[24]

Colon was convicted of making a false statement in violation of 18 U.S.C. § 1014 relating to the $500,000 loan he obtained from Royal Bank in 1988. In order to convict for a violation of 18 U.S.C. § 1014 in this context, the government must prove that (1) the defendant made or caused to be made a false statement or report to a bank in a loan application, (2) that the defendant acted knowingly and (3) that the false statement was made for the purpose of

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24. 18 U.S.C. § 1014 provides in relevant part:

> Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan [is guilty of making a false entry].

influencing the bank's actions on the loan. *See United States v. Concemi*, 957 F.2d 942, 951 (1st Cir.1992). The false statement need not be material, *see United States v. Wells*, 519 U.S. 482, 489-99, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), but the statement must be "for the purpose of influencing in any way the action of the [bank]." 18 U.S.C. § 1014.

The government alleged that Colon made a false statement on a mortgage deed to the farm that was filed at the registry of deeds on April 19, 1988, one month prior to the issuance of the $500,000 loan. The mortgage deed did not mention the Úsera's existing mortgage on the farm, stating instead that Royal Bank was granted a first mortgage on the farm. By way of defense, Colon argues that the statement on the deed was not intended to display the "contents [as if they] were necessarily then already true, but for use at closing." He maintains that there was insufficient evidence from which a jury could reasonably conclude that the statement (even if false) was made for the purpose of influencing the actions of Royal Bank. We agree.

On April 15, 1988, Juan Vicens, the vice president of Royal Bank, received a phone call from Colon requesting a $500,000 one-year loan. Colon offered a mortgage note on the farm as collateral for the loan. In a follow-up letter from Colon on April 18, Colon confirmed that he had requested the loan, "[o]ffering you as collateral a first mortgage note corresponding to a four hundred sixty-three point nine eight one seven 'cuerda' property. . . . Should the loan be approved as I expect, I will deliver the promissory note for seven hundred thousand dollars as collateral at the time of signing."

The next day, April 19, Colon registered a mortgage deed on the farm granting Royal Bank a first mortgage on the property. However, in the financing statement prepared by Colon's certified public accountant, and dated April 27, the Usera family's pre-existing mortgage was fully disclosed. The financing statement was submitted to Royal Bank as part of Colon's loan application. On May 3, 1998, Vicens prepared a letter to the Bank's credit department, recommending approval of the loan. In the letter, Vicens stated that Colon requested the loan "for the purposes of paying a debt which resulted from the purchase of property offered as collateral." The loan was approved on May 4. On May 13, Colon satisfied his obligations to the Usera family and the Usera family released their own first mortgage on the property. Three days later, on May 16, Colon signed the pledge contract at Royal Bank and obtained a check for the net amount of the $500,000 loan.

At trial, Vicens testified that he did not recall Colon telling him that the Usera's had a pre-existing mortgage on the property, but he specifically noted that "to me the important thing was that the day the loan was to be executed, that the property have the rank of a first mortgage." Colon fully disclosed the presence of the pre-existing mortgage in the financing statement. As Vicens testified on cross-examination, although he did not recall Colon informing him of the pre-existing mortgage verbally, "it's clear from this document that [the pre-existing mortgage] is mentioned on the financial statement." He further explained that the bank relies on the financing statement to make decisions regarding the disbursement of monies and that they are critical in determining the creditworthiness of the

individual. Moreover, in the actual letter recommending that the bank approve the loan, Vicens clearly stated that Colon needed the loan to pay off debt on the property that would be serving as collateral for the $500,000 loan.

Under these circumstances, no reasonable jury could find that the statement in the mortgage deed that Royal Bank had a first mortgage on the property was made for the purpose of influencing the bank to disburse a loan that the bank would not have otherwise made. To the contrary, that mortgage deed was filed in the public registry in anticipation of a loan closing with Royal Bank where Royal Bank would receive a first mortgage on the registry. Colon's loan application to the bank fully disclosed the presence of the Usera mortgage which would have to be discharged before Royal Bank obtained its first mortgage.

F. Conspiracy (Count One)

When charging conspiracy under 18 U.S.C. § 371, the government must prove that "the particular defendant and at least one other person expressly or tacitly agreed to commit a federal offense." *United States v. Josleyn*, 99 F.3d 1182, 1190 (1st Cir.1996). Further, the government must show that the defendant voluntarily participated in the conspiracy and that an overt act took place in furtherance of the conspiracy. *Blasini-Lluberas*, 169 F.3d at 67. The defendant need not be familiar with "all the details of the conspiracy," *Josleyn*, 99 F.3d at 1190, nor must the government prove the conspiratorial agreement or the defendant's participation in the agreement by direct evidence. *See Blasini-Lluberas*, 169 F.3d at 67.

Appendix A

Colon argues on appeal that we cannot affirm his conviction on the conspiracy count because the only evidence that connected him to the loan to Consuelo Garcia-Gomez was the handwritten notation by Blasini that the loan had been "discussed and agreed to by attorney R.L. Colon." Because this notation was allegedly written at a date following the actual transaction, the jury could not have concluded that he was involved in this transaction. For many of the reasons already stated, we disagree.

Contrary to Colon's contentions, the jury was not required to divorce the transaction with Consuelo Garcia-Gomez from Colon's transactions with the other members of the Usera family. Although we concluded that there was insufficient evidence to establish the criminality of those other transactions, we also noted that Colon and Blasini were "playing it close to the line" in those dealings. *Blasini-Lluberas*, 169 F.3d at 67. Colon's personal involvement in those transactions adds considerable significance to the notation "discussed and agreed to by attorney R.L. Colon," permitting a reasonable jury to conclude that Colon and Blasini, already working together on the prior transactions, had agreed to use bank funds to enable Colon to satisfy his delinquent debt to Consuelo Garcia-Gomez in violation of federal law, and that Colon and Blasini committed overt acts in furtherance of the conspiracy. Despite Colon's protests, it was for the jury to evaluate the importance of the notation on the loan document, regardless of the date that the notation was made, and all of the other evidence of Colon's collaboration with Blasini. We affirm the conspiracy conviction.

Appendix A

IV. Forfeiture (Count Twelve) and the Ex Post Facto Clause

Count Twelve of the indictment alleged that the farm was subject to forfeiture pursuant to 18 U.S.C. § 982(a)(2)(A).[25] Colon argues that the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, which prohibits the application of a law in a criminal proceeding where it would inflict "a greater punishment, than the law annexed to the crime when committed," *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798), barred the forfeiture of the farm because at the time the alleged crimes were committed, the statute did not allow for forfeiture as a penalty for the pertinent banking provisions.

On August 9, 1989, 18 U.S.C. § 982 was amended to add certain banking offenses (or conspiracy to commit such offenses) to the list of possible grounds for a criminal forfeiture. *See* Pub.L. No. 101-73, § 963(c)(1), 103 Stat. 183,

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25. The statute provides in pertinent part:

> The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate —
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> > (A) section . . . 657 . . . 1006 . . . 1014 . . . or 1344 of this title affecting a financial institution shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

18 U.S.C. § 982(a)(2).

504-05 (1989). Among the provisions newly included as grounds for forfeiture were §§ 657, 1006, 1014, and 1344, violations of which were alleged in the indictment as the object of the Count One conspiracy. *See id.* In this case, although the indictment alleged that most of the overt acts committed in furtherance of the conspiracy were committed prior to August 9, 1989, it did include an allegation concerning events occurring in August of 1990. On the basis of the 1990 acts, the government included a count under the criminal forfeiture statute to take possession of the farm.

In order to resolve the Ex Post Facto issue we must determine the scope of the conspiracy between Colon and Blasini established by the evidence, "for it is that which determines both the duration of the conspiracy and whether the act relied on is an overt act which may be properly regarded as in furtherance of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). The government must "prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on [the relevant date] and that at least one overt act in furtherance of the conspiracy was performed after that date." *Id.* at 396, 77 S.Ct. 963.

The government described the object of the conspiracy in Count I as follows:

> It was the object of the conspiracy that the defendants and coconspirators, and others to this Grand Jury known and unknown, would misapply or cause to be misapplied funds entrusted to or in the custody of the Ponce Federal Bank, F.S.B.,

> by means of false statements, representations and pretenses, to Ponce Federal Bank, F.S.B. and the Royal Bank de Puerto Rico, for the purpose of permitting Ramiro L. Colon Munoz and his wife to purchase and ultimately pay, a farm known as "La Esmeralda Numero Uno" with loans obtained from the Ponce Federal Bank, F.S.B., and the Royal Bank de Puerto Rico.

The government cites two overt acts "whose close interrelation extended the conspiracy beyond August 9, 1989, thus excepting the instant case from the application of the Ex Post Facto [C]lause." Those overt acts are:

> 9. On May 16, 1988, Ramiro L. Colon-Munoz obtained a loan for Five Hundred Thousand Dollars ($500,000.00) from Royal Bank de Puerto Rico, using "La Esmeralda" as collateral, a loan which he eventually paid off with funds belonging to Ponce Federal Bank, F.S.B.
>
> 10. On August 10, 1990, Ramiro L. Colon-Munoz paid to the Royal Bank de Puerto Rico approximately Three Hundred Eighty-Nine Thousand Seven-Hundred [sic] Thirty Dollars and Seventy-Six Cents ($389,730.76) by means of wire transfer in order to cancel the balance due on the Five Hundred Thousand Dollars ($500,000.00) loan from Royal Bank de Puerto Rico.

Appendix A

Although the May 16, 1988 loan from Royal Bank was obtained prior to enactment of the forfeiture provision on August 9, 1989, the government argues that repayment of that loan on August 10, 1990, subsequent to enactment of the forfeiture provision, justifies the application of that provision. We disagree.

The evidence on the conspiratorial agreement between Colon and Blasini was largely circumstantial, involving evidence of the Ponce Bank transactions with the members of the Usera family in which Colon and Blasini participated together. That evidence proves a conspiracy between Colon and Blasini to misapply Ponce Federal Bank's funds in satisfaction of Colon's debt to Consuelo Garcia-Gomez for the purchase of La Esmeralda. The goal of this conspiracy was realized on May 13, 1988 when Colon paid his indebtedness to the members of the Usera family, including Consuelo Garcia-Gomez, partly with overdrafts on his personal account at the Ponce Bank, and obtained a release of their mortgage on the farm. There is no evidence that the repayment of the Royal Bank loan on August 10, 1990 was an overt act in furtherance of the conspiracy between Colon and Blasini.[26]

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26. The government apparently contends that the Royal Bank loan of $500,000 on May 16, 1988 was an overt act in furtherance of the conspiracy between Colon and Blasini to use Ponce Bank funds to allow Colon to purchase La Esmeralda. In the government's view, the imminence of that Royal Bank loan on May 16 allowed Colon to incur briefly on May 13 the overdraft in his account when he issued checks to the Useras. That may be true. Nevertheless, the repayment of the Royal Bank loan in 1990 did nothing to further

(Cont'd)

A conspiracy does not continue indefinitely simply because the fruits of the conspiratorial objective continue into the future. *See United States v. Doherty*, 867 F.2d 47, 61 (1st Cir.1989) (holding that continuing salary payments for officers who received promotions (the object of the conspiracy) did not extend the conspiracy because salary payments, without more, are best understood as the "result" of the conspiracy). As the Supreme Court has noted:

> Though the result of a conspiracy may be continuing, the conspiracy itself does not thereby become a continuing one. Continuity of action to produce the unlawful result, or . . . continuous cooperation of the coconspirators to keep it up, is necessary.

Fiswick v. United States, 329 U.S. 211, 216, 67 S.Ct. 224, 91 L.Ed. 196 (1946) (internal quotation marks omitted). Colon's repayment of his Royal Bank loan is analogous to the continued receipt of increased salary as the result of the fraudulently obtained promotions at issue in Doherty. Where

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(Cont'd)

Colon's purchase of the property from the Useras. That transaction was completed in 1988. Also, the only involvement of Blasini in events subsequent to May 13, 1988 was his attendance at a Ponce board meeting in 1990 where the $615,500 severance package to Colon was approved. This money allowed Colon to pay off his debt to Royal Bank. Although the government introduced evidence pertaining to the severance package, and its retraction by the board after its issuance, the government never charged any illegal activity relating to the severance package, and Blasini's role in the meeting was not the subject of any testimony.

"the payoff [of a conspiracy] merely consists of . . . ordinary, typically noncriminal, unilateral actions, . . . and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues." *Doherty*, 867 F.2d at 61.

Although the government alleges that payments made after August 9, 1989 "were the last stages through which [Colon] attempted to fulfill the object of the conspiracy to ultimately pay for a farm known as 'La Esmeralda,' " this statement defines the conspiracy more broadly than the evidence can sustain. There is no allegation that Colon's repayment of the Royal Bank loan was itself illegal or that it involved the type of concerted activity through which conspiracies pose "special societal dangers." *See id.* The government's theory of the case would encompass any subsequent re-financing of Colon's payment for La Esmeralda, however legitimate, as furthering the conspiracy. To the extent that Colon continued in his efforts to complete payment on the loan he had received from Royal Bank and did so on August 10, 1990, those were his acts alone and not part of the conspiracy with Blasini to use Ponce Bank funds to purchase La Esmeralda. The application of forfeiture to the farm on the basis of the conspiracy charged in Count One of the indictment violates the Ex Post Facto Clause of the Constitution.

V. Evidentiary Objections

Colon claims that two evidentiary rulings at trial denied him a fair trial and warrant a reversal of the convictions and a new trial. We disagree.

Appendix A

At trial, the government introduced evidence that the Board of Directors of Ponce Federal Bank unanimously awarded Colon a $615,500 retirement package in 1990. Bank officials further testified that, seven months after he was awarded the severance package, Colon agreed to return the monies to Ponce Federal Bank for undisclosed reasons, and he pledged La Esmeralda as a guarantee for the return of the severance package (on which interest was still due at the time of trial). That is the extent of the severance pay evidence. There was no testimony relating to the legality or appropriateness vel non of the severance package, other than evidence that the bank's legal counsel had approved it.

Colon claims that the evidence was irrelevant and that, even if relevant, it was unfairly prejudicial. The government argues that this evidence was probative of an overt act in furtherance of the conspiracy — Colon's re-payment of his debt to Royal Bank in August 1990. We have rejected this theory of the conspiracy, discussed supra. Given that the conspiracy did not extend to the repayment of the Royal Bank loan in August 1990, we cannot accept the proposition that evidence of his severance package and its return was relevant to proving the existence of the conspiracy. However, we conclude that any error in the introduction of this evidence was harmless.

In reviewing for harmless error, we "ask whether the result would have been the same if the disputed evidence had not been admitted. We have therefore said that a conviction will be upheld if it is 'highly probable' that the result would have been the same." *United States v. Vigneau*, 187 F.3d 82, 85-86 (1st Cir.1999) (quoting *United States v.*

Cudlitz, 72 F.3d 992, 999-1000 (1st Cir.1996)). The severance package evidence was remote in time from the other charges, ambiguous, and briefly stated. The Useras were paid in May 1988; Colon's retirement and the severance package events did not transpire until August 1990. The testimony on the severance package did not establish any wrongdoing on Colon's part. It did not relate factually to any of the convictions we affirm. We are convinced, therefore, that it is highly probable that the results in this trial would have been the same without the admission of the disputed evidence and we hold that its admission was harmless.

Colon's second objection concerns the introduction of evidence of Blasini's apparent attempt to influence a witness prior to trial. During the government's rebuttal case, Marisel Marrero testified that Blasini approached her prior to trial and suggested that she might not recall the events at issue because they occurred so long in the past. The evidence was admitted as rebuttal evidence to refute Blasini's character evidence. Before the evidence was put before the jury, the court told the jury that it was not to consider Marrero's testimony "in any manner" as to Colon. In its final instructions to the jury, the court again informed the jury that it was not to consider this testimony in evaluating the government's case against Colon. Although Colon argues that the introduction of this evidence was unfairly prejudicial, any risk of prejudice was cured by the court's limiting instruction. "We must presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case, and that they follow those instructions." *United States v. Smith*, 145

F.3d 458, 462 (1st Cir.1998) (internal quotation marks omitted). The court carefully instructed the jury on two occasions that it was not to consider the evidence about Blasini's dealings with Marrero against Colon. The admission of this evidence did not deny Colon a fair trial.

VI. Conclusion

Although Colon challenges the court's enhancement of his sentence for his "leadership role," we do not address that argument because resentencing will be required in light of our disposition of this appeal. In summary, that disposition is the following:

The judgment is AFFIRMED on counts One, Six, Seven, Eight and Nine; VACATED on counts Two through Five, Eleven and Twelve. Upon remand, the district court shall enter a judgment of acquittal on counts Two through Five, Eleven and Twelve and shall re-sentence on the remaining convictions in light of this decision.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED JULY 30, 1997 AND FILED JULY 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRIMINAL 95-079CCC

UNITED STATES OF AMERICA,

Plaintiff

vs.

RAMIRO L. COLON,

Defendant

ORDER

Having considered the Memorandum of Law in support of Defendant RAMIRO L. COLON'S Rule 29(c) Motion (Docket 136), said renewed Rule 29(c) motion is DENIED.

SO ORDERED.

At San Juan, Puerto Rico, this 30 day of July, 1997

s/ Carmen Consuelo Cerezo
CARMEN CONSUELO CEREZO
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED JULY 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRIMINAL 95-079CCC

MINUTES OF PROCEEDINGS

BEFORE HON. CARMEN CONSUELO CEREZO Chief, United States District Judge

UNITED STATES OF AMERICA

Plaintiff

vs

JOSE F. BLASINI, RAMIRO L. COLON-MUNOZ

Defendants

The Court rules on the following motions:

* * *

4. SUPPLEMENTAL MOTION FOR INSPECTION OF DOCUMENTS IN SUPPORT OF MOTION FOR ACQUITTAL by Ramiro L. Colon-Munoz (docket entry 153) - is DENIED.

* * * *

s/ JHS
Law Clerk